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Roth Capital Partners, LLC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

In re METROPOLITAN SECURITIES
LITIGATION

No. CV-04-0025-FVS

CLASS ACTION

ROTH CAPITAL PARTNERS, LLC'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT RE: LOSS CAUSATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

ORAL ARGUMENT REQUESTED

Hearing Date: December 16, 2009
Hearing Time: 9:00 a.m.

ROTH'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT
(Case No. CV-04-0025-FVS)

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1 Roth Capital Partners, LLC (“Roth”) opposes Plaintiffs’ Motion for Partial
 2 Summary Judgment Re: Negative Causation (the “Motion”). Plaintiffs’ Motion
 3 fundamentally is an opposition to the expert report and deposition testimony of the
 4 auditors’ damages and loss causation expert, Christopher James. (Pls. Mot. at 13.)
 5 (“Plaintiffs will address primarily the arguments of PwC, E&Y, and James as to their
 6 theory of causation.”) The Motion refers to Roth’s damages and loss causation
 7 expert, Larry Y. Dann, Ph.D., only in passing. These sporadic references to
 8 Professor Dann in plaintiffs’ Motion are amply rebutted in Roth’s concurrently-filed
 9 Opposition to plaintiffs’ Motion to Exclude Professor Dann.

10 Moreover, and fatally for their Motion, plaintiffs incorrectly state the standard
 11 for loss causation (i.e., negative causation) under Section 11 of the Securities Act of
 12 1933. Plaintiffs erroneously assert that in order to establish a loss causation defense,
 13 a defendant must prove that “all of a plaintiff’s losses stemmed from matters
 14 unrelated to the misstatements.” (Pls. Mot. at 1; see also Id. at 8, in order “to prevail
 15 on their negative-causation defense, Defendants’ proof must totally eliminate their
 16 alleged misstatement as a contributing cause to Plaintiffs’ losses.” (emphasis
 17 added).) Plaintiffs further and equally erroneously contend that since defendants
 18 failed to establish a “total disconnection between Defendants’ misstatements and
 19 Plaintiffs’ losses,” the Court should grant summary judgment “dismissing”
 20 defendants’ loss causation defense and “bar[ring] Defendants from raising this
 21 affirmative defense at trial.” (Id. at 2, 9.) Plaintiffs’ assertions are contradicted by
 22 the plain language of Section 11(e), which provides:

23 [I]f the defendant proves that any portion or all of such damages
 24 represents other than the depreciation in value of such security resulting
 25 from such part of the registration statement, with respect to which his
 26 liability is asserted, not being true or omitting to state a material fact
 27 required to be stated therein or necessary to make the statements therein
 28 not misleading, such portion of or all such damages shall not be
 recoverable.

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1 15 U.S.C. § 77k(e) (emphasis added); see also Alaska Electrical Pension Fund v.
 2 Flowserve Corp., 572 F.3d. 221, 233 (5th Cir. 2009) (under Section 11(e) defendants
 3 are entitled to a reduction in damages “for so much of the loss as is not attributable to
 4 the misstatement” (emphasis added)); see also Akerman v. Oryx Communications,
 5 Inc., 810 F.2d 336, 340 (2d Cir. 1987) (“A defendant may, under section 11(e),
 6 reduce his liability by proving that the depreciation in value resulted from factors
 7 other than the material misstatement in the registration statement” (emphasis added)).
 8 Not surprisingly, plaintiffs have not cited a single case where a court has precluded
 9 defendants from asserting a loss causation defense at trial. Even assuming,
 10 *arguendo*, defendants are not entitled to summary judgment on the grounds that
 11 plaintiffs’ losses are not completely unrelated to the alleged misstatements, there is
 12 absolutely no authority for plaintiffs’ contention that defendants cannot assert a loss
 13 causation defense at trial and prove that 99.99% (or some other percentage) of
 14 plaintiffs’ losses were caused by factors unrelated to the alleged misstatements.

15 For the foregoing reasons, Roth respectfully requests that the Court deny
 16 plaintiffs’ Motion seeking to bar defendants from raising the defense of loss
 17 causation at trial.

18
 19 October 30, 2009

STROOCK & STROOCK & LAVAN LLP

20 By: /s/ Mary D. Manesis

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2009 I electronically filed the foregoing document described as: ROTH CAPITAL PARTNERS, LLC'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: LOSS CAUSATION with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record on the CM/ECF for this litigation.

/s/ Mary D. Manesis
Mary D. Manesis

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I hereby certify that on October 30, 2009 I electronically filed the foregoing document described as:

ROTH CAPITAL PARTNERS, LLC'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: LOSS CAUSATION

I electronically filed this document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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